Conservation and Confidentiality: Are the Concepts Compatible?

Melinda Taylor March 12, 2013

The dune sagebrush lizard is a light brown, 3-inch long reptile that lives in sand dunes that support low, shrubby shinnery oaks in Southeast New Mexico and West Texas. The lizard's habitat overlies a small portion of the Permian Basin, which happens to be the largest onshore oil and gas field in the United States. For decades, the lizard's numbers have been in decline, largely because of its sensitivity to the habitat disturbance that accompanies oil and gas development. Indeed, the Endangered Species Coalition has identified the dune sagebrush lizard as one of the top ten species in the U.S. threatened by oil and gas drilling.

The dune sagebrush lizard was identified as a "candidate species" for listing as threatened or endangered by the U.S. Fish and Wildlife Service in 2001. Nine years later, in December 2010, the Service proposed to list the lizard as "endangered," citing declining numbers and ongoing threats to its survival due to habitat loss. The reaction from the oil and gas industry and Texas agencies like the General Land Office and the Texas Comptroller of Public Accounts was swift and dramatic. They claimed that the listing would dramatically curtail oil and gas operations and cost hundreds of jobs and millions of dollars of revenue for the state, despite the fact that the lizard occurs on less than 2% of the Permian Basin.

In 2011, the Comptroller of Texas, Susan Combs, formed a multi-stakeholder group to put together a Texas Conservation Plan for the lizard, with the goal of convincing the Fish and Wildlife Service not to finalize the listing. The idea was that Texas landowners would voluntarily commit to a suite of conservation measures over 30 years to avoid and minimize adverse impacts to the lizard in return for an agreement from the Service that, should the species be listed in the future, no additional conservation measures would be imposed on the participating landowners. The agreement, formally called a "candidate conservation agreement with assurances," or "CCAA," would be similar to an agreement approved by the Service for landowners and state agencies in New Mexico in 2008. The Texas group drafted a number of management guidelines for landowners, including recommendations to use directional drilling and existing roadways and pipelines to avoid disturbing lizard habitat.

In June 2012, the Service announced that it would not list the dune sagebrush lizard as endangered after all, because of the "unprecedented commitments" to voluntary conservation made by landowners in Texas and New Mexico. The Service said that the threats to the species were no longer as significant as they were believed to be in 2010, citing the fact that over 60% of Texas landowners in the species' range had signed up to participate in the Texas Conservation Plan and over 80% of the lizard's habitat in New Mexico would be protected.

On the surface, the decision by the Service not to list the species appears to be a win-win. The species should benefit from measures designed to minimize habitat disturbance and private landowners benefit by avoiding the land use restrictions that accompany listing. The devil is in the details, however. It turns out that, while the CCAA approved by the Service for New Mexico contains clear protections for the lizard such as making prime state-owned habitat ineligible for oil and gas leasing, the Texas plan is much more nebulous. It contains recommendations rather than requirements and gives participating landowners significant discretion. For example, the plan "recommends" that construction and maintenance take place between October and March when the lizard is inactive and suggests that directional drilling be used "when practical" to avoid lizard habitat.

Even more disturbing, the specific provisions of the individual landowner agreements have never been reviewed by the Fish and Wildlife Service, because the State of Texas considers them confidential under state law. The Texas Comptroller's office has contracted with the Texas Habitat Conservation Foundation to negotiate agreements with individual landowners that are supposed to be in conformance with the overarching CCAA, but none of the agreements have been provided to the Service. Without reviewing the agreements, it is impossible for the Service to assess their adequacy and to monitor the implementation of the CCAA. Defenders of Wildlife, a national nonprofit conservation organization, released a white paper last week that is highly critical of the Texas Conservation Plan because of these deficiencies.

Voluntary, incentive-based programs to protect endangered species on private land are essential components of the Fish and Wildlife Service's policy cache. In Texas, more than 95% of the land is privately-owned and private property rights are cherished by landowners. The goal of CCAAs – to encourage private property owners to conserve rare species before they need to be listed as endangered – is laudable. Under the umbrella of a CCAA, a landowner can agree to conservation techniques that are compatible with her land uses and beneficial for the covered species. For the program to be credible to the general public, however, the individual agreements with landowners must be based on sound science and available for review by outside experts. The fact that neither the Fish and Wildlife Service nor the general public has access to the Texas agreements threatens to undermine the public's trust in the program as a whole.

The Service has announced that it will decide whether to list 250 additional candidate species by 2017. Among them are high profile candidates like the lesser prairie chicken, the listing of which would have major impacts on the energy industry in the Great Plains and the West. The pressure is on to find voluntary solutions like the CCAAs for the dune sagebrush lizard that would soften the regulatory blow. As the Service works with the affected states and groups on alternatives to listing, it is critical that the integrity of the process be protected. Shielding the individual agreements from the public's review, as the Texas confidentiality law does, may please property owners, but it will erode the program's credibility.

conservation endangered species water

Leave a Reply

Your email address will not be published. Required fields are marked *

Name *

Email *

Website

Comment

POST COMMENT

The KBH Energy Center blog is a forum for faculty at The University of Texas at Austin, leading practitioners, lawmakers and other experts to contribute to the discussion of vital law and policy debates in the areas of energy, environmental law, and international arbitration. Blog posts reflect the opinions of the authors and not of The University of Texas at Austin or the KBH Energy Center.

Popular Tags

Texas (54)
water (46)
energy (17)
drought (17)
fracking (14)
endangered species (12)
natural gas (11)
groundwater (8)
climate change (7)
court cases (6)
oil and gas (6)
conservation (5)
pollution (5)
TCEQ (5)
Clean Air Act (5)